81-42

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

CASE NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1980

RONALD E. GREGG,
PETITIONER

V.

CHARLES B. RAHM,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENNIS DEVERMONT, ESQ.
DEVERMONT & DEVERMONT
A Professional Corporation
Attorneys for Petitioner
406 Wilshire Boulevard
Santa Monica, California
Telephone: (213) 393-0308

QUESTIONS PRESENTED

1. Does a prior state court default judgment exercise a collateral estoppel force on a bankruptcy court with regard to the issues already adjudicated in the state court action?

2. Does a default judgment for invasion of privacy under California Penal Code Sections 632 and 637.2 imply malicious conduct within the meaning of Section 17(a)(8) of the Bankruptcy Act (11 U.S.C. 35 (a)(8))?

TABLE OF CONTENTS

Questions Presented i
Table of Authorities iv
Opinions Below 1
Jurisdiction 2
Constitutional and Statutory Provisions Involved 3
Statement of the Case 6
Reasons for Granting the Writ . . . 9
1. The Writ Must Be Granted to Clarify the Collateral Estoppel Effect of a Prior State Court Default Judgment upon the Bankruptcy Courts and to Resolve Conflicting Decisions in the Courts of Appeal 9
2. The Writ Must be Granted to Support California's Aggressive Enforcement of the Right of Privacy and to Prevent Malicious Wrongdoers Who Violate the Fundamental Right of Privacy from Avoiding the Civil Penalty Imposed for Their Wrong 17
3. Conclusion 34
Appendix
A. Opinion Sought to Be Reviewed, In re RAHM, 641 F.2d 755 (9th Cir. 1981) 35
B. Findings of Fact and Conclusions of Law. Signed August 26, 1977 43
C. Judgement. Filed August 26, 1977 49
D. Order of Remand Upon Appeal 51
E. Findings of Fact and Conclusions of Law (On Remand.) Filed December 21, 1978 . . 53
F. Order Affirming Judgment of Bankruptcy Court Entered December 21, 1978. Dated 4-13-79 58

G. Complaint to Determine Dischargeability and for Money Judgment (Complaint No. 1). Filed January 29, 1978 . . . 60

H. Objections of Findings of Fact and Conclusions of Law . . . 66

I. Reporter's Transcript of Proceedings, Monday, February 26, 1979 68

J. Declaration of Ronald E. Gregg Under CCP 585(4) in Lieu of Personal Testimony and Memorandum of Points and Authorities in Support of Entry of Default Judgment Against Defendant, Charles B. Rahm. Executed July 24, 1975 70

TABLE OF AUTHORITIES

Cases

A. A. Dietmann v. Time, Inc., 284 F. Supp. (D.C. Cal. 1968), affirmed 449 F. 2d 245 (9th Cir. 1971 26

Bedam v. Turney, 99 Cal. 649, 34 Pac. 442 (1893) 21

Bennett v. W. T. Grant Co., 481 F. 2d 664 (4th Cir. 1973) . . 19

Brown v. Felsen, 439 U.S 935 (1979) 15,16

Brown v. Kenron Aluminum and Glass Corp., 477 F. 2d 526 (8th Cir. 1973) 13,14,17,23

Cobian v. Ordonez, 103 Cal. App. 3d Supp. 22, 163 Cal. Rptr. 225 (1976) 31

Den Haerynck v. Thompson, 228 F. 2d 72 (10th Cir. 1955) 22

Egan v. Mutual of Omaha Insurance Co., 24 Cal 3d 809, 157 Cal. Rptr. 482 (1979) 30,31,32

Farmy v. College Housing, Inc., 48 Cal. App. 3d 166, 121 Cal. Rptr. 658 (1975) 20

Fults v. Superior Court, 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979) 26

Gill v. Manuel, 488 F. 2d 799 (9th Cir. 1973) 31

Griswold v. Connecticut, 381 U.S. 479 (1965) 26

Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946) 13,22,33

Henderson v. Security National Bank, 73 Cal. App. 3d 764, 140 Cal. Rptr. 388 (1977) 30

In re Burgas, 58 F. Supp. 717 (D.C. Cal. 1944) 22,33

In re Gabrielson, 1 B. R. 560 (B.C. N.Y. 1979) 16

In re Goodman, 35 F. Supp. 623 (D.C. N.Y. 1940) 22

In re Green, 87 F. 2d 951 (7th Cir. 1937) 19

In re Houtman, 568 F. 2d 651 (9th Cir. 1978) 10,15

In re Minsky, 46 F. Supp. 104 (D.C. N.Y. 1942) 22

In re Moore, 1 B. R. 52 (B.C. Cal. 1979) 23

In re Nance, 556 F. 2d 602 (1st Cir. 1977) 19

In re Rahm, 641 F. 2d 755 (9th Cir. 1981) 9,18,23

In re Willis, 2 B.R. 566 (B.C. Ga. 1980) 16

Johns-Manville v. Workers Compensation Appeals Board, 96 Cal. App. 3d 923, 158 Cal. Rptr. 463 (1979) 32

Kapp v. Naturelle, Inc., 611 F. 2d 703 (8th Cir. 1979) 14,15,17

Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975) 30

Kinsley v. Macur, 107 Cal. App. 3d 265, 165 Cal. Rptr. 608 (1980) 25

Laurence T. Lasagna, Inc. v. Foster, 609 F. 2d 392 (9th Cir. 1979), cert. denied, 446 U.S. 919 (1980) 9,10

Marbry v. Cain, 180 Tenn. 500, 176 S.W. 2d 813, cert. denied, 321 U.S. 800 (1944) 21

Matter of Kasler, 611 F. 2d 308 (9th Cir. 1979) 9,13

Miller v. Elite Insurance Co., 100 Cal. App. 3d 739, 161 Cal. Rptr. 332 (1980) 20

People v. Newton, 42 Cal. App. 3d 294, 116 Cal. Rptr. 690 (1974), cert. denied, Newton v. California, 420 U.S. 937 (1974) . . 27

People v. Wyrick, 77 Cal. App. 3d 903, 144 Cal. Rptr. 38 (1978) . 26

Porten v. University of San Francisco 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) 25

Riehle v. Margolies, 279 U.S. 218 (1929) 12,14

Robinson v. Early, 248 Cal. App. 2d 19, 56 Cal. Rptr. 183 (1967) . 23

Tinker v. Colwell, 193 U.S. 473 (1904) 18,19,21,22,27

U.S. v. Stinett, 11 Fed. Supp. 384 (D.C. Mich 1953) 20

Zhadan v. Downtown L.A. Motors, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132, appeal after remand, 161 Cal. App. 3d 821, 161 Cal. Rptr. 225 (1976) 31,32

Constitutions and Statutes

United States Constitution:
Amendment IV 25
Amendment IX 25
Amendment XIV 26

California Constitution, art I, § 1 25

Cal. Civ. Code §3294 31,32

Cal. Penal Code § 630 23,24
Cal. Penal Code § 632 23,25,26,33
Cal. Penal Code § 637.2 . . . 23,25,28,29

National Bankruptcy Act § 17(a)(8), 11 U.S.C. § 35(a)(8) 13

Books

Black's Law Dictionary (5th ed. 1979) 10,12,28,29

OPINIONS BELOW

The April 6, 1981, opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is reported at 641 F. 2d 755 (9th Cir. 1981) and is reprinted in Appendix A to this Petition. The prior opinions of the United States District Court for the Southern District of California, Civil Case Number 78-0057-N, are unpublished and are reprinted in Appendices D and F to this Petition. The prior opinions of the United States District Court for the Southern District of California, Bankruptcy Number 76-235 M, are unpublished and are reprinted in Appendices B, C, E, and G to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on April 6, 1981, and copies thereof are appended to this Petition in Appendix A. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional and statutory provisions cited below.

National Bankruptcy Act, Station 17(a)(8) 11 U.S.C. §35(a)(8)

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (8) are liabilities for willful and malicious injuries to the person or property of another.[1]

California Constitution, Article I, Section 1

> All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and pursuing and obtaining safety, happiness and privacy.

California Penal Code Section 630

> 630 (Declaration of policy)
> The Legislature hereby declares that advances in science and technology have led

---

[1]Because all relevant acts of the parties occurred prior to October 1, 1979, the date the new bankruptcy act became effective, §402 of Pub.L. 95 598, Title IV, Nov. 6, 1978, 92 Stat. 2682, disposition of the case is controlled by section 35(a) of the prior act. Section 35(a)(8) has been reenacted without significant alterations as 11 U.S.C. §523(a)(6).

to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.

The Legislature by this chapter intends to protect the right of privacy of the people in this state. The Legislature recognizes that law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehnsion of lawbreakers. Therefore, it is not the intent of the Legislature to place greater restraints on the use of listening devices and techniques by law enforcement agencies than existed prior to the effective date of this chapter.

California Penal Code, Section 632

(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500.00), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both such fine and imprisonment in the county jail or in the state prison.

California Penal Code Section 637.2

637.2 (Damages: Injunctive Relief)

(a) Any person who has been injured by a violation of this chapter may bring an

action against the person who committed the violation for the greater of the following amounts:

(1) Three thousand dollars ($3,000).

(2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(b) Any person may, in accordance with the provisions of Chpater 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may, in the same action seek damages as provided by the subdivision (a).

(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

STATEMENT OF THE CASE

On August 7, 1975, Petitioner, RONALD E. GREGG, obtained a state court default judgment for $3,022.60 against Respondent, CHARLES BARRY RAHM, for civil penalties imposed by California Penal Code § 637.2 for violation of California Penal Code 632. Section 637.2 provides civil penalties when an individual invades the right of privacy of another by intentionally recording the other's confidential communication without his permission, in violation of section 632.

Respondent, RAHM, filed a voluntary petition in bankruptcy under former 11 U.S.C. § 21(a)(6) on January 29, 1976. GREGG brough an action in the Bankruptcy Court against RAHM to determine the dischargeability of the judgment debt. GREGG argued that the debt should not be discharged because it falls within the exception to dischargeability for debts resulting from willful and malicious injuries to another person within the meaning of 11

U.S.C. 38(a)(8). Judgment was entered in favor of the Bankrupt, RAHM, on a finding that the recording was made with GREGG's Consent.

GREGG appealed to the District Court which ruled in its Order of Remand Upon Appeal that by reason of the default judgment the issue of consent was not triable in Bankruptcy Court. The Bankruptcy Judge was directed to render specific Findings and Conclusions with respect to the issue of whether or not Defendant's conduct was willful and malicious within the meaning of Section 17(a)(8) of the Bankruptcy Code. On December 21, 1978, the Bankruptcy Court found, from a review of the trial evidence, that the intent of RAHM at the time of recording was not such as to render his conduct willful and malicious.

On Remand, both parties submitted briefs to the District Court. Appellant contended on appeal that as a matter of law a violation of California Penal Code Sec-

tions 632 and 637.2, conclusively established by judgment, constitutes willful and malicious conduct within the meaning of 17(a)(8). The parties argued the matter on February 26, 1979. The Bankruptcy Court's judgment, after its rendering specific findings, was ordered affirmed by the District Court on April 13, 1979.

GREGG then appealed to the Court of Appeals for the Ninth Circuit. The case was argued on February 2, 1981, and decided April 6, 1981. The Court of Appeals found that the default judgment had no collateral estoppel force on the bankruptcy court unless both parties agreed to rest their case on it. Further, the court found that the recording was willful but not malicious under 11 U.S.C. 35(a)(8).

REASONS FOR GRANTING THE WRIT

1. THE WRIT MUST BE GRANTED TO CLARIFY THE COLLATERAL ESTOPPEL EFFECT OF A PRIOR STATE COURT DEFAULT JUDGMENT UPON THE BANKRUPTCY COURTS AND TO RESOLVE CONFLICTING DECISIONS IN THE COURTS OF APPEAL.

The Court of Appeals held in the present case that, "in this circuit a prior state court judgment has no collateral estoppel forced on a bankruptcy court unless both parties agree to rest their case on that judgment." In re Rahm, 641, F.2d 755, 757 (9th Cir. 1981). This finding was based on Matter of Kasler, 611 F.2d 308, 309 (9th Cir. 1979) and Laurence T. Lasagna, Inc. v. Foster, 609 F.2d 392, 396 (9th Cir. 1979), cert. denied, 446 U.S. 919, 100 S. Ct. 1853, 64 L. Ed. 2d 273 (1980).

The key to these decisions appears to be the 1970 amendments to the Bankruptcy Act which grant exclusive jurisdiction to

the Bankruptcy Courts for determination of the dischargeability of debts. In Lasagna, supra, p. 396, the Ninth Circuit states that, "after the 1970 Amendments, the doctrine of collateral estoppel may not be applied in determining dischargeability of debt evidenced by state court judgments under §17 of the Act." This holding was based upon In re Houtman, 568 F.2d 651, 653 (9th Cir. 1978), which states, "As we read those Amendments, there is no room for the application of the technical doctrine of collateral estoppel in determining the non-dischargeability of debts . . . ."

Turning to Black's Law Dictionary, 5th ed. (1979), one reads on page 237:

> Collateral estopped doctrine - Prior judgment between the same parties on a different cause of action is an estoppel as to those matters in issue or points controverted, on determination of which finding or verdict was rendered. [Citation.] When an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation.

Applying the definition to the cases cited

above, one sees that they hold simply that Bankruptcy Courts are not required to recognize a state court judgment on the issue of dischargeability and are not prevented from relitigating that specific issue. They do not hold that the Bankcruptcy Courts cannot or may not recognize a state court judgment that conclusively finds liability and the facts necessary to support liability. On the contrary, the only state court judgment that can be excluded from the Bankruptcy Courts is one on the specific issue of dischargeability.

This interpretation makes indisputable sense when one recognizes that Bankruptcy Courts have exclusive jurisdiction on the specific issue of dischargeability. A state court decision on dischargeability cannot be recognized due to lack of subject matter jurisdiction. Conversely, a state court decision on the normally state issue of liability should be conclusive and serve as a bar to future

litigation on the same issue.

It has long been established that state court judgments, including default judgments, have a res judicata effect in federal courts. Riehle v. Margolies, 279 U.S. 218, 225, 49 S. Ct. 310, 73 L. Ed. 669 (1929), states, "A judgment by default is as conclusive an adjudication of the issues for purposes of res judicata as a judgment rendered after a trial on the merits."

Returning to Black's Law Dictionary, one sees that it distinguishes "res judicata" from "collateral estoppel" by noting that res judicata constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Res judicata needs identity of the thing sued for as well as identity of action, of persons and parties to the action, and of quality in persons for or against whom claim is made. Black's, p. 1174.

Many decisions which purport to give

res judicata or "claim preclusion" effect actually give collateral estopped or "issue preclusion" effect to the state court judgment. The Eighth Circuit has a history of broad application of the doctrine or res judicata to the point that it becomes collateral estopped. Before the 1970 amendments to the Bankruptcy Act, the Eighth Circuit held in Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946), that liability resulting from a state default judgment for punitive damages stemming from injuries caused while driving intoxicated were not dischargeable. The court found that the default judgment was conclusive evidence of willful and malicious injuries to the person. Harrison, supra, p. 590. In Harrison, supra, a state court default judgment on the issues of willfulness and malice, not dischargeability, was given effective collateral estoppel force under the guise of res judicata.

In Brown v. Kenron Aluminum and Glass

Corp., 477 F. 2d 526 (8th Cir. 1973), a state court default judgment for fraudulent misrepresentation, breach of contract and unconscionability of contract was recognized. The court found that the allegations of the original complaint become the findings of fact for the purposes of dischargeability. Brown, supra, p. 531. The decision was based upon Riehle v. Margolies, supra and was called "res judicata," but again recognized a default judgment as conclusive on the issues of willfulness and malice.

In Kapp v. Naturelle, Inc., 611 F. 2d 703 (8th Cir. 1979), long after the adoption of the 1970 amendments, the court recognized a state default judgment as conclusive on the issue of the bankrupt's personal liability for corporate debts. The bankrupt had contested the original judgment because he could recover surplus funds if the debts were not held as personal. The Bankruptcy and District Courts

retried the issue of liability and held that the debts were corporate but the Court of Appeals overruled and reinstated the state court judgment, stating:

> If entered by a court having jurisdiction of the parties and the subject matter, and absent fraud or collusion, even a default judgment operates as res judicata and is conclusive of whatever is essential to support the judgment. 611 F. 2d 707.

Facts and intent are "essential to support" liability for a debt or damages. Under Kapp, supra, the court will not only recognize the effect of a state court judgment but also the issues essential to the judgment. This ruling resembles "collateral estoppel" more closely than res judicata.

Bankruptcy Courts throughout the nation are giving collateral estoppel effect to state court default judgments under the guise of res judicata. Kasler, supra, which the Ninth Circuit relied upon in the present case, was based upon Houtman, supra and Brown v. Felsen, 439 U.S. 925,

99 S. Ct. 307, 58 L. Ed. 2d 317 (1979). A Bankruptcy Court in the Fifth Circuit interpreted Brown v. Felsen, supra, as follows: "Brown does not say that where grounds for, or defenses to, were in fact issues in the state court case that the Bankruptcy Court is required to re-try those same issues already adjudicated in a state court case which is followed by a bankruptcy case." In re Willis, 2 B.R. 566 (B.C. Ga. 1980). The Bankruptcy Court then found the debt nondischargeability because the award for punitive damages already tried the issue of malice.

The Bankruptcy Court in In re Gabrielson, 1 B.R. 560 (B.C. N.Y. 1979), gave conclusive effect on the issue of malice to a default judgment for malicious prosecution.

One sees that the rules are set in terms of collateral estoppel and res judicata but that the implementation of the rules extends between the two guides. Many

courts prohibit relitigation of the issues already conclusively decided in a state court default judgment under the term res judicata. Kapp, supra, and Kenron, supra, etc. A state court judgment that requires malice on its face should be conclusive on the issue of malice in the Bankruptcy Courts. The Supreme Court should hear this case in order to clarify the rules with regard to the res judicata and collateral estoppel effect of a prior state court default judgment in Bankruptcy Court on issues other than dischargeability and to resolve the conflict between the Courts of Appeal.

2. THE WRIT MUST BE GRANTED TO SUPPORT CALIFORNIA'S AGGRESSIVE ENFORCEMENT OF THE RIGHT OF PRIVACY AND TO PREVENT MALICIOUS WRONGDOERS WHO VIOLATE THE FUNDAMENTAL RIGHT OF PRIVACY FROM AVOIDING THE CIVIL PENALTY IMPOSED FOR THEIR WRONG.

The prior Bankruptcy Act provided that bankruptcy would release a debtor from all

of his debts excluding liabilities for willful and malicious injuries to the person or property of another (11 U.S.C. 35 (a) (8)). The Court of Appeals refused to exclude RAHM's debt to GREGG under section 35(a)(8) on the grounds that it was willful but not malicious. In re Rahm, supra, p. 557. The term "willful and malicious" under section 35(a)(8) was given meaning in Tinker v. Colwell, 193 U.S. 473, 48 L. Ed. 754, 24 S. Ct. 505 (1904), which interpreted a nearly identical provision in the 1898 Bankruptcy Act. The Supreme Court stated, "In a legal sense [willful and malicious conduct] means a wrongful act, done intentionally, without just cause or excuse." Tinker, supra, p. 486. It continued, "we think a willful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously."

Tinker, supra, p. 487. This set of definitions has been passed down nearly unchanged since 1904.

The few elucidations that have followed have only reinforced the concept that "willful and malicious injury, in the Bankruptcy Act, does not necessarily involve hatred or ill will as a state of mind . . . ." In re Green, 87 F.2d 951, 953 (7th Cir. 1937). Recently the courts have noted that "[t]here need be no showing of 'special malice' toward the injured party, only that the act 'is done deliberately and intentionally in knowing disregard of the rights of another.'" In re Nance, 556 F. 2d 602 (1st Cir. 1977) citing Bennett v. W. T. Grant Co., 481 F. 2d 664 (4th Cir. 1973). In exempting from discharge $561.00 in rental and statutory overcharges in violation of the Housing and Rent Act of 1947, the court found:

> That it is the duty of all of us to observe the laws of our country is elementary, and when one violates a law which has as its

> purpose the protection of the public welfare, he commits an act that is against good morals since he engages in conduct that does not conform to the generally accepted rules which govern a society of people interested in promoting the welfare of each other. U.S. v. Stinnett, 111 Fed. Supp. 384, 387 (D.C. Mich. 1953).

Malice in the Bankruptcy Act is clearly a lesser form of malice than regular or special malice. Petitioner has found no difference, though, in the manner of proving malice in bankruptcy versus special malice. "To prove that a tort was maliciously perpetrated it is not necessary to establish a specific intent against the person wronged. Oppression or malice supplying such intent may be established by the conduct of the perpetrator. Farmy v. College Housing, Inc., 48 Cal. App. 3d 166, 174, 121 Cal. Rptr. 658 (1975). (Italics in original.) "Malice is formed before the occurrence takes place and is wilful, intentional and done in reckless disregard of its possible results." Miller v. Elite Insurance Co., 100 Cal. App. 3d 739, 758, 161 Cal. Rptr. 332 (1980).

The courts have made it clear that malice does not have to be an express element of the statute violated or the tort committed in order that the damages resulting not be dischargeable in bankruptcy. A debt will not be dischargeable if it results from "that class of torts in which malice or injury are always implied." Marbry v. Cain, 180 Tenn. 500, 505, 176 S.W. 2d 813, certioari denied, 321 U.S. 800, 64 S. Ct. 938, 88 L. Ed. 1087 (1944). Tinker, supra, held nondischargeable a $50,000 tort obligation arising from an act of adultery or "illegal conversation." In Bedan v. Turney, 99 Cal. 649, 34 Pac. 442 (1893), cited in Tinker, supra, a husband's right of action for illegal conversation "is established upon proof of the intercourse, and the means by which this intercourse was effected are but incidents to increase or mitigate his damages." 99 Cal. 653. No malice is required whatsoever. Tinker, supra,

elaborates:

> There may be cases where the act has been performed without any particular malice toward the husband, but we are of the opinon that, within the meaning of the exception, it is not necessary that there be this particular, and so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute. 193 U.S. 485. (Italics mine.)

The courts have held debts nondischargeable for a wide variety of torts and statutory violations, many of which were based upon default judgments.[1]

---

[1] In re Goodman, 35 F. Supp. 623 (D.C. N.Y. 1940), Defendant accidentally shot a bystander when firing warning shots to scare away suspected thieves in violation of a law against discharging firearms in a public place.

In re Minsky, 46 F. Supp. 104 (D.C. N.Y. 1942), based on a default judgment for willful and malicious interference with contractual relations or property.

In re Burgas, 58 F. Supp. 717 (D.C. Cal. 1944), based on a default judgment for forcible entry when defendant's truck drove over property and damaged tomato vines.

Harrison v. Donnelly, supra, based on a default judgment for punitive damages for injuries caused while driving intoxicated.

Den Haerynck v. Thompson, 228 F. 2d 72 (10th Cir. 1955), based upon a guilty plea for fourth degree manslaughter for killing a youth with defendant's car. Exception to discharge was for the "fault and negligence of the defendant"

The Court of Appeals in the present case held that a judgment under Penal Code §632 does not connote malice. 641 F. 2d 757. The court did not explore the nature of implied malice and its presence in a violation of section 632 because it did not examine the purpose of the statute as described in section 630 (which was presented in Appellant's Opening Brief on pages 3-5) and it did not recognize that the damages awarded by §637.2 are punitive damages.

Chapter 1.5 of Title 15 of the California Penal Code on the Invasion of Privacy opens with §630 which presents legislative findings and intent with regard to the laws protecting confidential communi-

---

(p. 74) even though claimed under "willful and malicious injuries" clause.

Robinson v. Early, 248 Cal. Appl. 2d, 19, 56 Cal. Rptr. 183 (1967), for practicing medicine without a license.

Brown v. Kenion, supra, based on a default judgment for fraudulent misrepresentation, breach of contract, and unconscionability of contract.

In re Moore, 1 B.R. 52 (B.C. Cal. 1979), based on a default judgment for housing discrimination.

cations. In §630 the Legislature declares "that the invasion of privacy resulting from continual and increasing use of [eavesdropping and recording] devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society. The Legislature by this chapter intends to protect the right of privacy of the people in this state." C.P.C. §630. (Italics mine.) The Legislature could hardly be more emphatic in protecting the fundamental right of privacy than by stating that the illegal acts constitute a "serious threat" to liberty and "cannot be tolerated." But it was. It instituted a civil penalty of the greater of $3,000 or triple actual damages for violation of the chapter. The plaintiff does not even need to be threatened with actual damages in order to receive the minimum $3,000 penalty. In addition, plaintiff may seek injunctive relief to enjoin and restrain a

a violation (C.P.C. 637.2(b)) and there is a maximum criminal penalty of $2,500 and one year in prison. C.P.C. §632.

The California Constitution states, "All people are by nature free and independent, and have certain inalienable rights, among which are . . . privacy." CAL. CONST. Art. I, § 1. "The constitutional provision is self-executing; hence, it confers a judicial right of action on all Californians. [Citation.] Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839 (1976). Accord Kinsley v. Macur, 107 Cal. App. 3d 265, 165 Cal. Rptr. 608 (1980).

The right to privacy has been firmly recognized as a fundamental right under Article I, Sec. I of the California Constitution and under the Fourth, Ninth, and

Fourteenth amendments to the United States Constitution. "As a fundamental liberty, it is protected even from incidental encroachment absent the demonstration of some compelling interest that is both legitimate and overriding. [Numerous state and federal citations, including Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).]" Fults v. Superior Court, 88 Cal. App. 3d 899, 903, 152 Cal. Rptr. 210 (1979). The right of privacy has equal priority with the paramount rights of free speech and press. A. A. Dietmann v. Time, Inc., 284 F. Supp. 925, 929 (D.C. Cal. 1968), affirmed 449 F. 2d 245 (9th Cir. 1971).

Section 632 was held constitutional in People v. Wyrick, 77 Cal. App. 3d 903, 144 Cal. Rptr. 38 (1978). A confidential communication is violated under §632 when "the person whose conversation was recorded had a reasonable expectation of privacy at the time of the recording." People v.

Newton, 42 Cal. App. 3d 294, 296, 116 Cal. Rptr. 690 (1974), certiorari denied, Newton v. California, 420 U.S. 937, 95 S. Ct. 1147, 43 L. Ed. 2d 414 (1974).

Just as a legitimate, overriding and compelling interest is necessary to uphold a law that encroaches even incidentally upon the right of privacy, so should this standard apply to discharge a penalty imposed for a violation of the right. The penalties imposed to protect the right of privacy are a sham if they can be released by a lesser standard than they are imposed with. "It was an honest debtor, and not a malicious wrongdoer, that was to be discharged." Tinker, supra, p. 488. Petitioner submits that RAHM should not be released from the penalty imposed to protect the right of privacy absent a legitimate, overriding and compelling reason. Petitioner further submits that bankruptcy fails to meet this standard.

The Court of Appeals afforded little

regard to the nature of the debt owed by RAHM. The debt was a $3,000 civil damage penalty for criminally invading GREGG's right of privacy. Under section 637.2(c) it is not a necessary prerequisite to an action that the plaintiff has suffered, or be threatened with, actual damages. In Black's Law Dictionary, pp. 351-354, there are thirty-seven definitions associated with the word "damages." Of these, only three require a showing of little or no actual damages: exemplary (or punitive), nominal and statutory damages. "Punitive damages" are given to punish the defendant or set an example. Black's, p. 352. "Nominal damages" are a trifling sum awarded when there is no substantial injury but the law grants damages to recognize a technical invasion of a right. Black's, p. 353. "Statutory damages" result from statutorily created causes of action, as opposed to actions at common law. Black's, p. 354.

Obviously, the civil penalty under section 637.2 is a statutory damage award. But Black's does not state the purpose of statutory damages. One can assume that legislatures probably create statutory damages for two reasons: one is to set limits for certain types of compensatory damages, and the other is to punish the defendant or set an example. Since section 637.2(a)(2) provides three times the amount of actual damages, it is clearly punitive. One can reasonably assume then that the companion measure §637.2(a)(1) is punitive as well. Few people would consider $3,000 nominal.

By reviewing the standards that the courts and the legislature have developed for the imposition of punitive damages, one can understand the gravity of the penalty involved.

Punitive damages "are not favored by the law and they should be granted with the greatest of caution. [Citations.]; they

will be allowed only in the clearest of cases. [Citation.]" Henderson v. Security National Bank, 72 Cal. App. 3d 764, 771, 140 Cal. Rptr. 388 (1977) "An award of exemplary damages cannot be based on mere speculation; it depends instead on a definite showing of a willingness to vex, harass, or injure consistent with a wrongful intent to injure." Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 958, 123 Cal. Rptr. 848 (1975).

Exemplary damages have been a part of California law since the first comprehensive code was enacted in 1872. Egan v. Mutual of Omaha Insurance Co., 24 Cal. 3d 809, 819, 157 Cal. Rptr. 482 (1979). They are authorized at Civil Code §3294 (West Supp. 1981) which read at the time of the violation:

> In an action for the breach of an obligation not arising from contract, where the defendant is guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant.

"[T]he principal purpose of section 3294 is to deter acts deemed socially unacceptable and, consequently, to discourage the perpetuation of objectionable [actions]." Egan, supra, p. 820. "Even a finding of no compensatory damages by the jury would not necessarily deprive plaintiff of an award for punitive damages." Cobian v. Ordonez, 103 Cal. App. 3d Supp. 22, 30, 163 Cal. Rptr. 126 (1980). Accord, Gill v. Manuel, 488 F. 2d 799, 802 (9th Cir. 1973).

Most of the cases quoted above awarded punitive damages based on tort actions under Civil Code § 3294. Exemplary damages are also awarded for violations of statutory provisions. For example, punitive damages were awarded a plaintiff who was the victim of unscrupulous auto repair practices in violation of the Business and Professions Code. Zhadan v. Downtown L.A. Motors, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132, appeal after remand, 161 Cal.

App. 3d 821, 161 Cal. Rptr. 225 (1976). "Th supplemental award [in a worker's compensation action] to an injured employee for the serious and willful misconduct of his employer is analogous to an award for punitive damages in tort actions." Johns-Manville v. Workers Compensation Appeals, 96 Cal. App. 3d 923, 931, 158 Cal. Rptr. 463 (1979). When an award is based on a statutory violation "due consideration must be given to the importance of the public policy embodied in the statutory provision . . . ." Zhadan, supra, p. 497. When punitive damages are awarded based on a statutory provision, the California Supreme Court "cannot usurp the Legislature's determination that such damages should be recoverable in cases in which the statutory prerequisites are fulfilled." Egan, supra, p. 820. This rule should apply to the Bankruptcy Courts as well.

As a general rule, punitive damages, even if based on a default judgment, are

conclusive evidence of willful and malicious injuries to the person because the standard of malice required for punitive damages is narrower than that required for bankruptcy. Harrison, supra, p. 590. A default award of treble damages for forcible entry in a California case was ruled equivalent to proof of willful and malicious injury to property. Burgas, supra, p. 719.

With reference to the above cases, one can recognize that the $3,000 civil penalty for violation of §632 is a punitive damage award intended to punish the wrongdoer and to deter future violations. The Legislature enacts such stringent penalties only if it determines that malice must always be present. The statute is intended to protect the fundamental right of privacy and requires strict judicial review. Nonetheless, the default judgment for punitive damages serves as proof of willful and malicious injuries. The Court

of Appeals decision should be overruled to support California's aggressive enforcement of the right of privacy and to recognize the finding of malice implied in a judgment for punitive damages.

3. CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DENNIS DEVERMONT, ESQ.
DEVERMONT & DEVERMONT
A Professional Corporation
Attorneys for Petitioner
406 Wilshire Boulevard
Santa Monica, California
Telephone: (213) 393-0308

APPENDIX A

OPINION SOUGHT TO BE REVIEWED

In re Charles Barry RAHM, Bankrupt

United States Court of Appeals,
Ninth Circuit
No. 79-3301

Argued and Submitted February 2, 1981

Decided and Entered April 6, 1981

641 F. 2d 755 (9th Cir. 1981)

Appeal from the United States District Court for the Southern District of California.

Before POOLE and FERGUSON, Circuit Judges, and CROCKER,* District Judge.

FERGUSON, Circuit Judge:

This case stems from a state default judgment obtained by plaintiff Gregg against the defendant Rahm. When Rahm petitioned for a declaration of bankruptcy, Gregg asserted that the judgment came within the Bankruptcy Act's exceptions to

*Honorable M. D. Crocker, United States District Judge, Eastern Division of California, sitting by designation.

dischargeability. Because Gregg has failed to provide any evidence that the acts upon which Rahm's liability was founded were "malicious," as required for the exception to dischargeability, we uphold the district court's conclusion that the judgment debt was dischargeable.

I

On August 7, 1975, Gregg obtained a default judgment for $3,032.60 against Rahm. The judgment was founded upon §§ 632 and 637.2 of the California Penal Code, which provide civil penalties when an individual intentionally records another's confidential communication without his permission.[1] The judgment had its origin

[1]Section 632 provides in pertinent part:

> Every person who, intentionally and without the consent of all parties to a confidential communication . . . records such confidential communication, . . . shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500) or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both such fine and imprisonment in the county jail or in the state prison.

Section 637.2 provides in pertinent part:

in a telephone call from Gregg to Rahm. Gregg, an attorney, had telephone Rahm, his client, to give advice concerning a pending business transaction and to reconcile apparently inconsistent statements made earlier. Rahm recorded the conversation without Gregg's consent, thus contravening Cal. Pen. Code §632.

After the default judgment was entered, Rahm filed a voluntary petition in bankruptcy. Subsequently, Gregg brought an action in bankruptcy court to determine the dischargeability of the judgment-debt. The bankruptcy court found that the acts leading to the judgment were not "willful

(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:

(1) Three thousand dollars ($3,000)

(2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

and malicious," as required for exclusion from dischargeability under former 11 U.S.C. § 35(a)(8).[2] Consequently, it found the debt dischargeable. The district court affirmed and this appeal followed.

II

[1,2] Under 11 U.S.C. § 35(a)(8), a liability stemming from the "willful and malicious" conduct of the debtor is not dischargeable in bankruptcy. The creditor has the burden of proving both willfulness and malice. Matter of Kasler, 611 F.2d 308, 309 (9th Cir. 1979). This burden is weighty in light of the rule that excep-

[2]Section 35(a) provided in pertinent part:

A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (8) are liabilities for willful and malicious injuries to the person or property of another.

Because all relevant acts of the parties occurred prior to October 1, 1979, the date the new bankruptcy act became effective, 402 of Pub. L. 95 598, Title IV, Nov. 6, 1978, 92 Stat. 2682, disposition of the case is controlled by section 35(a) of the prior act. Section 35(a)(8) has been reenacted without significant alterations as 11 U.S.C. § 523(a)(6).

tions to dischargeability are to be strictly construed so as to effectuate the Congressional policy of permitting bankrupts a fresh start. Id. at 310.

Gregg appears to argue that the default judgment required the bankruptcy court to find willfulness and malice. This argument is without merit.

[3] First, in this circuit a prior state court judgment has no collateral estoppel force on a bankruptcy court considering dischargeability unless both parties agree to rest their cases on that judgment. Kasler, supra, at 309; Lawrence T. Lasagna, Inc. v. Foster, 609 F.2d 392, 396 (9th Cir. 1979), cert. denied, 446 U.S. 919, 100 S. Ct. 1853, 64 L. Ed. 2d 273 (1980). At most, a prior judgment establishes a prima facie case of non-dischargeability which the bankrupt is entitled to refute on the basis of all relevant evidence. Id.

[4] Second, on the record under con-

sideration it is doubtful that even a prima facie case was established.[3] Gregg has not cited any authority for the proposition that a judgment under §§ 632 and 637.2 implies malice; further, the statute on its face requires no mental element beyond the intention to record. See Cal. Pen. Code § 632. See generally, Warden v. Kahn, 99 Cal. App. 3d 805, 160 Cal. Rptr. 471 (1979). This intent requirement is consistent with the meaning of willfulness under § 35(a)(8), see Kasler, supra, at 310, but has no bearing on the question of malice.

In Tinker v. Colwell, 193 U.S. 473, 480, S. Ct. 505, 506, 48 L. Ed. 754 (1904), the Supreme Court defined "malice" under § 17(2) of the Bankruptcy Act of 1898.

[3]Because Gregg has failed to demonstrate that a judgment under Cal. Pen. Code § 632 connotes malice, we need not consider the potentially different effect of a litigated, as opposed to a default, judgment. See generally, In re McMillan, 579 F. 2d 289, 292 (3d Cir. 1978).

That section contained language identical to 11 U.S.C. § 35(a)(8). Tinker held that an act is malicious when done with "a willful disregard of what one knows to be his duty" and when it is "an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally." 193 U.S. at 487, 24 S. Ct. at 509; Kasler, supra, at 310 n.6. Cf. Matter of Kearney Chemicals, 468 F. Supp. 1107, 1110 (D. Del. 1979) (under § 35(a)(8), an act is malicious if "wrongful and without just cause or excuse . . .").

The default judgment provides no basis for concluding that Rahm's conduct in recording the phone call was "against good morals and wrongful in and of itself."[4]

[4] Indeed, the bankruptcy court concluded that Rahm recorded Gregg's phone call "merely to be certain that instructions would be clear." This finding must be accepted unless clearly erroneous. In re Houtman, 568 F.2d 651, 653, (9th Cir. 1978).

Since Gregg has offered no evidence beyond that judgment, he has failed to meet his burden of proof as to malice. This lack of proof is fatal to his appeal.

The judgment entered by the district court is

AFFIRMED.

APPENDIX B

IN THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bankruptcy No. 76-235 M/S
Adversary Proceeding 1

This cause came on regularly for hearing before the Honorable Russell B. Seymour, Bankruptcy Judge, on June 24, 1977 on the complaint to determine dischargeability and for money judgment, filed by plaintiff, RONALD E. GREGG, and on the answer to complaint to determine dischargeability and for money judgment filed by the defendant, CHARLES BARRY RAHM, the plaintiff appearing personally and being represented by James J. Biggins, Jr. and the defendant appearing personally and being represented by Ralph E. Garner and the court having considered the record in the above entitled case, the pleadings and arguments of the parties hereto, now makes the following findings of fact and conclusion of law.

FINDINGS OF FACT

1. That this court has jurisdication to hear and determine the issues raised by plaintiff's complaint to determine dischargeability of the debt owed by the defendant, CHARLES BARRY RAHM, at the time of the filing of his petition in bankruptcy herein.

2. That on February 15, 1973 defendant placed a telephone call to plaintiff which was received by plaintiff at his place of business located at 9777 Wilshire Boulevard, Beverly Hills, California, in the County of Los Angeles, State of California.

3. That at all times mentioned herein plaintiff was an Attorney at Law duly licensed to practice before all the Courts of the State of California.

4. That said telephone call was made by said defendant for the purpose of obtaining legal advice from the plaintiff for the defendant's use and benefit.

5. That as the result of such telephone call, plaintiff and said defendant had a telephone conversation which was made by plaintiff as an attorney-client communication.

6. That on said date said telephone conversation was recorded with the aid of an electronic recording device.

7. That said telephone conversation was recorded with full knowledge, consent and permission of all parties to the conversation.

8. That the recording of said telephone conversation between the plaintiff and defendant was not done maliciously.

9. That on January 12, 1974 in San Diego Municipal Court case 202499 Ronald E. Gregg, through his counsel did stipulate that the tape on which said telephone conversation was recorded and the tape recorder be admitted into evidence in said case.

10. That the aforementioned stipu-

lation relative to the introduction into evidence of said tape recorded conversation was tantamount to an admission by Ronald E. Gregg, the plaintiff herein, that said tape recorded conversation was admissible as evidence in a court proceeding.

11. That at all times mentioned here in Section 632 and 637.2 of the California Penal Code were in full force and effect.

12. That on or about August 7, 1975 plaintiff, Ronald E. Gregg, obtained a judgment in the Municipal Court of the State of California for the Beverly Hills Judicial District in case number 92087 in the amount of $3000.00 plus $22.60 cost.

13. That said judgment was obtained by the plaintiff, Ronald E. Gregg, against the bankrupt and defendant herein by default and was based upon an action arising from Statutory Liabilities imposed by Section 632 and 637.2 of the California Penal Code.

14. That said default judgment ob-

tained by Ronald E. Gregg is the debt which was listed by the defendant Charles Barry Rahm, in the within bankruptcy case and is the subject of this litigation.

15. The debt which was owing by the defendant to the plaintiff at the time of the filing of the within bankruptcy case was both a provable and an allowable debt in the within case and proceeding.

16. The debt which was owing to the plaintiff from the defendant at the time of the filing of the bankruptcy petition herein by the defendant was a judgment based on alledged tortious conduct on the part of the defendant.

CONCLUSIONS OF LAW

17. That the conduct of the defendant was not willful and malicious within the meaning of Section 17a(8) of the Bankruptcy Act.

18. That there was no violation of any of the provisions of the California Penal Code with reference to the taping of

the telephone conversation between the plaintiff and the defendant herein.

19. That the debt which was due and owing to the plaintiff by the defendant at the time of the filing of the bankruptcy petition herein by the defendant is a dischargeable debt in the within case and proceeding.

20. That defendant is entitled to judgment in his favor.

DATED: August 26, 1977 /s/Russell B. Semour
Bankruptcy Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COUT OF THE SOUTHERN DISTRICT OF CALIFORNIA

JUDGEMENT

Bankruptcy No. 76-235 M/S
Adversary Proceeding 1

This cause came on regularly for hearing before the HONORABLE RUSSEL B. SEYMOUR, Bankruptcy Judge, on June 24, 1977 on the complaint to determine dischargeability and for money judgment, and filed by Plaintiff, RONALD E. GREGG, and on the answer to complaint to determine dischargeability and for money judgment filed by the Defendant, CHARLES BARRY RAHM, the plaintiff appearing personally and being represented by James J. Biggins, Jr. and the defendant appearing personally and being represented by Ralph E. Garner and the court having received evidence both oral and documentary, the court having considered the record in the above entitled case, the pleadings and arguments of the parties hereto, and having made its Findings of Fact and Conclusions

of Law and good cause of appearing therefor.

IT IS HEREBY ORDERED that plaintiff's compalint on file herein be and the same hereby is denied, and

IT IS FURTHER ORDERED that the judgment be, and it hereby is, rendered in favor of the Defendant, CHARLES BARRY RAHM, and is agains the Plaintiff, RONALD E. GREGG.

DATED: August 26, 1977

/s/ Russell B. Seymour
Bankruptcy Judge

Filed: August 26, 1977.
Bankruptcy Court
So. Dist. Calif.
By:_____
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ORDER OF REMAND UPON APPEAL

Bankruptcy No. 76-0235-M
(Civil No. 78-0057-N)

Argument having been presented and considered upon the above-captioned Appeal by Plaintiff/Appellant from the Judgment entered on August 26, 1977 in Adversary Proceedings No. 1 before the Bankruptcy Court, on April 17, 1978 before the HONORABLE LELAND C. NIELSEN, U.S. District Judge, there appearing Appellant by and through his counsel, JAMES J. BIGGINS, JR., and Appellee by and through his counsel, RALPH E. GARNER, and the Court having found that the Bankruptcy Court was, by reason of the State Court Judgment previously entered between the parties, foreclosed from trying the issue on whether Plaintiff consented to the tape recording of the telephone conversation which was the subject of the Complaint below, IT IS HERE-

BY ORDERED that this cause be remanded to the Bankrtupcy Court and that Court is directed to render specific findings and conclusions with respect to the issue of whether or not the Defendant's conduct was willful and malicious within the meaning of §17a(8) of the Bankruptcy Act.

Dated:

LELAND C. NIELSEN, U.S. District Judge

This Order prepared and Submitted by:

/s/ James J. Biggins, Jr.
JAMES J. BIGGINS, JR., Attorney for Appellant

APPROVED AS TO FORM:

Dated:

/s/ Ralph E. Garner
RALPH E. GARNDER, Attorney for Appellee, CHARLES BERRY RAHM

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FINDINGS OF FACT AND CONCLUSIONS OF LAW (ON REMAND)

Bankruptcy No. 76-235 M/S
Complaint No. 1

TO THE HONORABLE LELAND C. NIELSEN, U.S. DISTRICT COURT JUDGE:

Under date of May 30, 1978, an Order of Remand on Appeal was made and entered, directing the Bankruptcy Court to render specific findings and conclusions with respect to the issue of whether the Defendant's conduct was willful and malicious within the meaning of Section 17a(8) of the Bankruptcy Act.

On November 2, 1978, the undersigned Bankruptcy Judge met in chambers with JAMES J. BIGGINS, JR., Attoney for the Plaintiff, and RALPH E. GARNDER, Attorney for the Defendant. As a result of which, by November 17, 1978, it was agreed in writing that this Court should make its rulings based on the evidence produced in the original pro-

ceedings, and that no further evidence would be adduced by either party.

Accordingly, the Court is now considering only two transcripts dated January 20, 1977, and the one dated June 24, 1977, for the purpose of complying with the Order of the District Court, in respect to Finding of Fact No. 8[1] and Conclusion of Law No. 17.[2]

The specific subsidiary findings supporting No. 8 are:

8.1 That prior to the phone call in question on February 15, 1973, PIZANTE and GREGG, Attorneys at Law, had by letter dated February 6, 1973, furnished the defendant RAHM direction as to the formation of a finance company, which appeared to

[1] 8. That the recording of said telephone conversation between the plaintiff and defendant was not done maliciously.

[2] 17. That the conduct of the defendant was not willful and malicious within the meaning of Section 17a(8) of the Bankruptcy Act.

RAHM and his associated, JOHN F. HUTZEL, (who was to furnish most of the money to be raised for the finance company), to be different from earlier oral directions furnished by the attorneys.

8.2 The earlier amount required to be raised was indicated to be about $100,000 (within the capability of HUTZEL). The later amount was indicated to be about $200,000 (beyond the capability of HUTZEL).

8.3 The telephone call on February 15, 1973, was to try to find any alternate plan to meet the capability of HUTZEL and to reconcile apparently inconsistent statements earlier made by PIZANTE as to financial requirements.

8.4 There was no intention by RAHM at the time of the rewriting to sue either of the attorneys, merely to be certain that instructions would be clear.

8.5 The information received during the phone call doubtlessly precipitated the demand by RAHM for return of the retainer

fee fo [sic] $1832.00 but does not prove that the recording was maliciously done.

8.6 The use of the tape at the San Diego case trial on January 12, 1974, even though "by stipulation" does not necessarily establish any malevolent intent as of the date of the date of the recording, nor does it establish any acquiescence by the plaintiff (here) in the otherwise unauthorized recording.

CONCLUSIONS OF LAW

17. The conduct of the defendant was not willful and malicious within the meaning of Section 17a(8).

Discussion

Even though conduct of a party be criminal, it does not always follow that it is "willful and malicious" within the meaning thereof in the Bankruptcy Act, and in particular in Section 17a(8), the section relied upon by the plaintiff.

The mere fact that an act is illegal does not necessarily render it non-

dischargeable. See In re WRIGHT v. LUBINKO, 9th Cir. (1975) 515 F.2d 260 at 263, a case which involved a violation of California Corporate Securities Act. Actual fraud as opposed to constructive fraud was required.

So in the instant case, a technical violation of Section 732 of the Penal Code of California (which permitted the judgment for $3,000.00) is not sufficient to deny dischargeability of the judgment absent specific intent by the bankrupt to injure the plaintiff GREGG.

Dated: DECEMBER 21, 1978

/s/ Russell B. Seymour
RUSSELL B. SYEMOUR
Bankruptcy Judge

File Date: December 21 1978
Bankruptcy Court
Southern District California

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR TH SOUTHERN DISTRICT OF CALIFORNIA

ORDER AFFIRMING JUDGMENT OF BANKRUPTCY COURT ENTERED DECEMBER 21, 1978

Bankruptcy No. 76-235-M/A
Complaint No. 1
(Civil No. 78-0057-N)
Appeal No. 1

This matter came on for hearing on the 26th day of February 1979, before the Honorable Leland C. Nielsen, District Court Judge, on the appeal filed by Ronald E. Gregg from a judgment entered in the Bankruptcy Court on the 21st day of December, 1978, and the Appellant, Ronald E. Gregg, being represented by James J. Biggins, Jr., Esquire, and the Appellee, Charles Barry Rahm, being represented by Ralph E. Garner, Esquire, briefs having been submitted by both the appellant and by the appellee and oral argument having been given by both parties and the Court having duly considered Appellant's appeal and good cause appearing therefor,

IT IS HEREBY ORDERED that the order entered by the Bankruptcy Court on the 21st day of December 1978, in favor of Appelle, Charles Barry Rahm, be, and the same hereby is, affirmed.

DATED: 4-13-79

/s/ Leland C. Nielsen
U.S. DISTRICT COURT
JUDGE

Approved as to form:

RALPH E. GARNER, Attorney for
Charles Barry Rahm, Appellee

JAMES J. BIGGINS, JR., Attorney
for Ronald E. Gregg, Appellant

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

COMPLAINT TO DETERMINE DISCHARGEABILITY
AND FOR MONEY JUDGMENT
(COMPLAINT NO. 1)

Bankruptcy No. 76-235 M

Comes now the plaintiff, and complains of the defendant, and for cause of action alleges as follows:

1. That CHARLES BARRY RAHM is the bankrupt in the above entitled proceeding.

2. That on or about August 7, 1975, plaintiff obtained judgment in the Municipal Court of the State of California for the Beverly Hills Judicial District, in Case No. 92087 in the amount of $3000.00, plus $22.60 costs.

3. That said judgment was obtained by the default of said bankrupt/defendant and was based upon an action arising from statutory liabilities imposed by Sections 632 and 637.2 of the California Penal Code.

4. That at all times mentioned herein Section 632 of the California Penal Code

was in full force and effect, and provided as follows:

"(a) Every person who, intentionally or without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500.00), or by imprisonment . . ."

5. That at all times mentioned herein, Section 637.2 of the California Penal Code was in full force and effecd, and provided as follows:

"(a) Any person who has been injured by a violation of this Chapter may bring an action against the person who

committed the violation for the greater of the following amounts:

(1) Three thousand dollars ($3000.00).

(2) Three times the amount of actual damages, if any, sustained by the plaintiff . . .

(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damage . . .".

6. That on February 15, 1973, defendant placed a telephone call to plaintiff which was received by plaintiff at his place of business located at 9777 Wilshire Boulevard, Beverly Hills, California, in the county of Los Angeles, State of California.

7. That at all times mentioned herein, plaintiff was an attorney at law duly licensed to practice before the courts of the State of California.

8. That the telephone call alleged herein was made by said defendant for the purpose of obtaining legal advice from

plaintiff for his use and benefit.

9. That as a result of said telephone call, plaintiff and said defendant had a telephone conversation which plaintiff believed to be, and intended to be, confidential and which was made by plaintiff as an attorney-client communication.

10. That on said date, the defendant recorded said confidential communication with the aid of an electronic recording device without the knowledge, consent, or permission, expressed or implied, of plaintiff, in violation of Section 632 of the California Penal Code, and without lawful privilege.

11. That as a proximate result of said defendant's wrongful recording of said confidential communication, plaintiff suffered injury, as hereinafter alleged.

12. That plaintiff suffered injury in that said wrongful recording constituted an unwarranted and unlawful invasion of plaintiff's right of privacy, and plaintiff

is therefore entitled to recover from defendant statutory damages in the sum of $3,000.00, pursuant to Section 637.2 of the California Penal Code.

13. That said defendant wilfully and and intentionally concealed from plaintiff the fact of said wrongful recording until April 15, 1974, and plaintiff did not become aware of said wrongful recording and the resulting unlawful invasion of his right of privacy until April 15, 1975; that plaintiff, in the exercise of ordinary care, could not have acquired knowledge of such fact until April 15, 1974.

WHEREFORE, plaintiff prays judgment as follows:

1. For judgment that his claim against the defendant is non-dischargeable under the provisions of Section 17(a) (2), (4) and (8) of the National Bankruptcy Act.

2. For judgment for money damages in the amount of the judgment previously entered in the Municipal Court of the State

of California in the amount of $3,022, plus 7% interest from August 7, 1975.

DATED MARCH 19, 1976

SMITH, BIGGINS, BOLLMAN & MOGILNER
BY: /s/ James J. Biggins, Jr.
JAMES J. BIGGINS, JR.
Attorneys for Plaintiff

Filed: January 29, 1978
Bankruptcy Court
San Diego, California

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OBJECTIONS OF FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Bankruptcy No. 76-235 M/S
Adversary Proceeding No. 1

COMES NOW the Plaintiff, RONALD E. GREGG, and objects to the Findings of Fact and Conclusions of Law lodged herein on August 2, 1977 by Defendant, CHARLES BARRY RAHM as follows:

1. Plaintiff objects to proposed Finding of Fact No. 7 on the grounds that:

a) Said finding is not supported by the evidence,

and b) knowledge, consent, and permission was not in issue in this action in that it had already been adversely determined against Defendant in action No. 92087 in the Municipal Court of California, Beverly Hills Judicial District.

2. Plaintiff objects to Finding of Fact No. 8 on the grounds that:

a) Said finding is not supported by the evidence,

and b) The Court reserved a ruling on said issue having found the telephone conversation was with the consent of Plaintiff.

3. Plaintiff objects to Finding of Fact No. 10 on the grounds that it is only partially correct and submits as an alternative finding the following: "That said telephone call was made by Defendant for the dual purpose which was to obtain legal advice and to commit Plaintiff to a version of facts respecting the fee argument with his law firm so that said recording could be used in any future dispute between Defendant and Plaintiff".

5. Plaintiff object to Conclusions of Law 17, 18, 19, and 20 on the grounds that said conclusions are not supported by valid Findings of Fact.

Dated:

JAMES J. BIGGINS, JR.
Attorney for Plaintiff,
RONALD E. GREGG

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE LELAND C. NIELSEN,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
San Diego, California
Monday, February 26, 1979
(Edited by Petitioner)

Case 76-0235-M/S
Civil No. 78-0057-N

THE CLERK: No. 21 on calendar, Case No. 76-235-M/S, Bankruptcy: In Re Charles Barry Rahm, Bankrupt; hearing appeal from Bankruptcy Court, Compalint No. 1, Appeal No. 1.

THE COURT: Let's hear the Rahm matter.

MR. BIGGINS: James Biggins for the appellant, your Honor.

Our position, briefly, is that the California legislature, in effect, has defined the conduct complained of. That definition is tantamount to wilful and malicious conduct of the Bankruptcy Act and the federal bankruptcy court must or should honor the state's definition, that it's

consistent with a ruling in Tinker v. Caldwell, although the gravament of the complaints were different, but in each instance a very serious right was violated. I think there's no controversy as to whether or not the violations took place because of the Twelfth Judgment and we submit as a matter of law what the defendant did was not dischargeable.

THE COURT: I think it's a close case, but I think that his finding on the remand that it was not done wilfully or maliciously within the intent of the Bankruptcy Act is not clearly erroneous and the appeal will be denied.

APPENDIX J

IN THE MUNICIPAL COURT OF BEVERLY HILLS MUNICIPAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

DECLARATION OF RONALD E. GREGG UNDER CCP 585(4) IN LIEU OF PERSONAL TESTIMONY AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ENTRY OF DEFAULT JUDGMENT AGAINST DEFENDANT, CHARLES B. RAHM
(Edited by Petitioner)

No. 92087

I, the undersigned, declare and state:

I am the Plaintiff herein.

This Declaration is made pursuant to Code of Civil Procedure §484(4) in support of judgment after default against Defendant CHARLES B. RAHM.

If sworn as a witness, I can competently testify as follows:

On February 15, 1973, CHARLES B. RAHM called me on the telephone at my place of business located at 9777 Wilshire Boulevard, Beverly Hills, California, for the purpose of obtaining legal advice from me.

I am now, and was on February 15, 1973, an attorney at law, licensed to prac-

tice in the State of California.

The said telephone conversation was believed by me and intended by me to be confidential in nature as the conversation covered a legal matter I was handling for Mr. Rahm and his associate, defendant, JOHN F. HUTSEL.

During the said telephone conversation, Mr. Rahm and Mr. Hutsel recorded our conversation by means of an electronic recording device. This was done without my knowledge or consent and it was not discovered by me until April 15, 1974.

The act of Mr. Rahm in recording our telephone conversation was in violation of Penal Code Section 632 and, as such, constituted an unlawful invasion of my right to privacy.

Under Penal Code Section 637.2, I am entitled to maintain a civil action against Defendant CHARLES B. RAHM and recover from him the statutory sum of $3,000.00, for the unlawful invasion of my right to privacy,

notwithstanding the fact that actual damages are not shown.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of July, 1975, at Beverly Hills, California.

/s/_____
RONALD E. GREGG